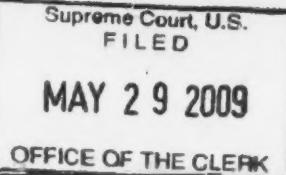


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No. 08-1018



IN THE  
**Supreme Court of the United States**

THE STATE OF OHIO,  
*Petitioner,*  
v.

THOMAS L. VENEY,  
*Respondent.*

**On Petition for a Writ of Certiorari to the  
Supreme Court of Ohio**

**REPLY BRIEF OF PETITIONER  
STATE OF OHIO**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
CONCLUSION .....	10

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page</b>
<i>Bousley v. United States</i> , 523 U.S. 614 (1998).....	10
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969).... <i>passim</i>	
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006).....	7
<i>Hawaii v. Office of Hawaiian Affairs</i> , 556 U.S. ___, 129 S.Ct. 1436 (2009) .....	3
<i>Kansas v. Marsh</i> , 548 U.S. 163 (2006).....	7, 8
<i>Kansas v. Ventris</i> , 556 U.S. ___, 129 S.Ct. 1841 (2009).....	7
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	3, 8
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001).....	3
<i>Rivera v. Illinois</i> , 556 U.S. ___, 129 S.Ct. 1446 (2009).....	5
<i>State v. Ballard</i> , 66 Ohio St.2d 473, 423 N.E.2d 115 (1981) .....	3-4
<i>State v. Colon</i> , 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917 (2008).....	4
<i>State v. Wamsley</i> , 117 Ohio St.3d 388, 2008 Ohio 1195, 884 N.E.2d 45 (2008)....	5
<i>United States v. Dominguez-Benitez</i> , 542 U.S. 74 (2004).....	2
<i>United States v. Timmreck</i> , 441 U.S. 780 (1979).....	5
<i>Vermont v. Brillon</i> , 556 U.S. ___, 129 S.Ct. 1283 (2009).....	7
<b>STATUTES</b>	
28 U.S.C. § 1257(a).....	7
<b>RULES</b>	
Fed.R.Crim.P. 11 .....	8
Ohio Crim.R. 11(C)(2)(c).....	2, 4, 5, 6
Ohio Crim.R. 52(A).....	4

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**ARGUMENT**

At the time respondent pleaded guilty, the Ohio trial court did not orally advise him that his plea was waiving his right to require the prosecution to prove his guilt at a trial beyond a reasonable doubt. However, the beyond-reasonable-doubt right and respondent's understanding that he was waiving that right were set forth in a written Entry of Guilty Plea, which respondent orally acknowledged approving. Respondent also orally acknowledged having reviewed his constitutional rights with his counsel.

Respondent does not dispute the three major bases asserted by petitioner Ohio for granting certiorari

review. In particular, respondent does not dispute that the overwhelming majority of case law, including almost all federal circuits, has concluded that federal due process under *Boykin v. Alabama*, 395 U.S. 238 (1969), does not require any oral advisement. Under *Boykin*, the record need only affirmatively disclose in some way that the defendant was aware of the *Boykin* rights he was waiving.

Respondent also does not dispute that a fair number of courts have concluded that the beyond-reasonable-doubt right is not a *Boykin* right.

Respondent also does not dispute that this Court has previously concluded that the omission of a plea advisement does not amount to structural error always requiring reversal. *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004). Respondent does not even address the written Entry of Guilty Plea, which Entry shows that the omission of the oral advisement was not prejudicial.

Finally, respondent does not dispute that petitioner Ohio's asserted grounds for seeking certiorari were fully preserved below.

Instead of directly challenging the strong grounds for granting certiorari, respondent asserts that the Ohio Supreme Court's ruling was only a state-law ruling determining the reach of Ohio's Crim.R. 11(C)(2)(c). Respondent asserts that the Ohio Supreme Court was merely exercising "supervisory power" in determining that the omission of the oral advisement under the rule would always require reversal. For the following reasons, these contentions lack merit.

## A.

While respondent argues that “[t]he Ohio Supreme Court’s decision rests entirely upon independent state grounds,” see Brief in Opposition, at 18, respondent does not address this Court’s “plain statement” standard. As this Court recently reiterated, “[t]his Court has jurisdiction whenever ‘a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.’” *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. \_\_\_, 129 S.Ct. 1436, 1442 (2009), quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

At the very least, the Ohio Supreme Court’s ruling represents an interwoven mixture of federal constitutional law and state criminal procedure. The Ohio Supreme Court determined the issue of “strict compliance” by reference to whether the plea was “constitutionally infirm.” Such a ruling provides a sufficient basis for jurisdiction. See, e.g., *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (“We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law.”).

The fairest reading is that the Ohio Supreme Court was primarily basing its ruling on federal constitutional law. The Ohio Supreme Court rejected the prosecution’s arguments that *Boykin* was not violated. The Court cited *Boykin* eight times in the key passages from paragraphs 24 through 30 in reaching the conclusion that the plea was “constitutionally infirm.” In reaching this “constitutionally infirm” conclusion, the Court also relied heavily on *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), which itself was a federal constitutional rul-

ing determining "what does *Boykin* require of a trial court." *Id.* at 476, 423 N.E.2d at 117.

B.

No part of the ruling shows that the Court based its ruling solely on "supervisory power" over the administration of Ohio's Crim.R. 11(C)(2)(c). The frequent citations to *Boykin* and *Ballard* belie any narrow "supervisory" holding, as does the fact that the Court never mentioned a "supervisory" basis for decision.

In addition, the Court acknowledged that it would not have adopted an automatic-reversal principle if the case had involved only a nonconstitutional error. The Court stated at paragraph 17 that "[o]ur precedent \* \* \* establishes that a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue." If the Court had agreed with the prosecution that only a "nonconstitutional aspect" was involved in the failure to give the oral beyond-reasonable-doubt advisement, the Court would have required a showing of prejudice, and the prosecution would have prevailed, since the Entry of Guilty Plea established the lack of prejudice.

The Court also would not have disregarded Ohio's Crim.R. 52(A), which provides that harmless errors shall be disregarded. Only constitutional error could amount to error always requiring reversal. *State v. Colon*, 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917, ¶ 21 (2008). Ohio appellate courts have only a narrow power to reverse. "In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings."

*State v. Wamsley*, 117 Ohio St.3d 388, 2008 Ohio 1195, 884 N.E.2d 45, ¶ 19 (2008). Only an error of purported constitutional dimension requiring automatic reversal could countermand the Ohio Supreme Court's otherwise-extant need to comply with Ohio's Crim.R. 52.

To be sure, the Ohio Supreme Court *could* have confined itself to the issue of how it would enforce its mere criminal-rule requirement. If the Court had done so, the prosecution could not seek certiorari review here. But if the Court had done so, the prosecution would have no need to seek review, since the prosecution would have prevailed under the standards of "substantial compliance" and harmless-error review that Ohio law otherwise recognizes.

It bears emphasis that "errors of state law do not automatically become violations of due process." *Rivera v. Illinois*, 556 U.S. \_\_\_, 129 S.Ct. 1446, 1455 (2009). "The Due Process Clause \* \* \* safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial." 129 S.Ct. at 1454 (internal quotation marks omitted). Ohio's Crim.R. 11 could not amend the Constitution. See *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979).

### C.

The constitutional nature of the Ohio Supreme Court's ruling should have come as no surprise to respondent, who specifically argued for such a ruling. Respondent repeatedly cited *Boykin* and argued that "[c]ourts must strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) \* \* \*." (Defense Merit Brief, at p. 3) As the defense argued below:

The criminal rules state that a judge shall not accept a plea without informing the defendant and determining that he understands that, by entering the plea, he is waiving his right to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial. *This is unquestionably a federal constitutional right that applies to the states through the Due Process Clause.* It is a right that one must be aware of before any guilty plea can be knowingly and intelligently made.

(*Id.* at p. 11; emphasis added) As the defense further argued below:

The judge has an express duty to make a proper record and to inform the defendant that the state is required to prove his guilt beyond a reasonable doubt at trial and to determine that the defendant understands this right. The trial court completely failed to abide by the Constitution and the law in this regard and it cannot be concluded that the defendant's guilty plea was knowingly and voluntarily entered.

(*Id.* at p. 17; emphasis added)

The Ohio Supreme Court naturally took these arguments to mean that respondent was seeking a constitutional ruling. In paragraph six of its opinion, the Court summarized respondent's argument as contending "that the trial court's failure to orally advise him of the state's burden of proof as required by Crim.R. 11(C)(2)(c) is *constitutional error* affecting a substantial right that automatically invalidates his plea." (Emphasis added)

While respondent accuses petitioner Ohio of "obfuscat[ing]" the basis for the Ohio Supreme

Court's ruling, respondent himself is the party who insisted that the error was of constitutional dimension. The Ohio Supreme Court adopted that argument, and this Court now has jurisdiction to review these constitutional issues.

D.

Respondent errs in claiming that petitioner Ohio is asserting its own due-process rights and that petitioner can have no objection when the Ohio Supreme Court provides greater protection to criminal defendants. Petitioner is *not* claiming any due-process right of its own, but, rather, petitioner is claiming that the Ohio Supreme Court went too far by finding due-process error. Respondent set up a constitutional/due-process claim, and the Ohio Supreme Court sustained that claim. This Court has jurisdiction to address whether the state court correctly sustained respondent's constitutional claim. 28 U.S.C. § 1257(a) (review allowed "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

As for the contention that the Ohio Supreme Court could have provided greater protection to respondent as a matter of state law, the problem is that the Court did not purport to do so. Instead, the Court provided greater protection based at least in substantial part on its view of what the federal constitution required. This Court can and will review state-court rulings that err in a criminal defendant's favor vis-à-vis a federal constitutional issue. See, e.g., *Kansas v. Ventris*, 556 U.S. \_\_\_, 129 S.Ct. 1841 (2009); *Vermont v. Brillon*, 556 U.S. \_\_\_, 129 S.Ct. 1283 (2009); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Brigham City v. Stuart*, 547 U.S. 398 (2006).

"Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Marsh*, 548 U.S. at 185 (Scalia, J., concurring). "[I]t cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion." *Long*, 463 U.S. at 1040 (emphasis *sic*).

#### E.

While respondent contends that the case is unimportant because it will merely result in Ohio trial-court judges complying with an oral-advisement requirement imposed by state law, respondent unwittingly concedes the importance of this case by emphasizing that the vast majority of cases are disposed through plea-based proceedings. Issues regarding the exact reach of *Boykin* and the availability of harmless-error review therefore potentially affect the vast majority of cases. The *Boykin* issues are recurring, and courts throughout the nation could potentially benefit from a ruling by this Court. This Court could also benefit, since, if an oral beyond-reasonable-doubt advisement is constitutionally required, then Fed.R.Crim.P. 11 would need amendment, as it does not currently require such an advisement.

#### F.

Respondent's claim that the case is in danger of becoming "moot" is perplexing. There is no danger of mootness. The issues of whether the plea proceeding was invalid and/or requires reversal both create a

live controversy, as decisions on those issues would directly affect whether respondent's conviction will be reinstated or whether the case must be reproc-  
ecuted in the trial court.

Respondent errs in contending that his present detention in the county jail somehow might result in a mooting of the case while certiorari review remains pending. Respondent assumes that he is serving a five-year sentence and that the five-year term might run out before this Court rules. But there is no five-year sentence in place at this point, since that sentence has been vacated and respondent has been returned to the county jail to await further trial-court proceedings. The original five-year sentence could be reinstated only if this Court accepts review. The trial court is properly awaiting word on whether this Court will accept review. Petitioner Ohio agrees that respondent potentially faces a total of up to twenty-one years on the reinstated charges at this point.

Respondent is being held without bail because his bail was revoked due to his failure to appear in the case for over one year from November 2004 to January 2006 when the case was originally pending in the trial court.

Even if a five-year sentence were being served now, that sentence still would not run out before this Court could be expected to rule. The five-year sentence would not have been expected to expire until December 2010. If this Court grants review by the end of June 2009 or at the start of the October 2009 term, a ruling could be expected by June 2010, well before a five-year sentence would expire.

Respondent's mootness argument also ignores the fact that he had received a mandatory three-year

term of “post-release control” under Ohio law, which is a special parole term that must be served after service of the five-year sentence.

Respondent’s suggestion that he might abandon defense of the Ohio Supreme Court’s ruling is also easily addressed. If such abandonment occurs, this Court could appoint a counsel as special amicus for this Court to defend the lower-court ruling. See, e.g., *Bousley v. United States*, 523 U.S. 614, 618 (1998). Abandonment by respondent would not “moot” the case.

## CONCLUSION

In light of the foregoing arguments, petitioner Ohio stands by its petition for writ of certiorari and respectfully requests that this Court grant the petition.

Respectfully submitted,

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May 29, 2009